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7 BEFORE THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON

9 In the Matter of the Application
10 regarding the Conversion and
11 Acquisition of Control of Premera Blue
12 Cross and its Affiliates.

No. G 02-45

REPLY IN SUPPORT OF MOTION TO
CLARIFY SEVENTEENTH ORDER
AND DECLARE FORM A COMPLETE

13
14 On October 31, 2003, PREMERA and Premera Blue Cross (collectively,
15 "Premera") moved for an order declaring Premera's Form A Statement complete (the
16 "Motion"). The Motion also asked for clarification or amendment of one sentence in the
17 Seventeenth Order. The OIC Staff filed a Response to the Motion ("Staff Resp."), and the
18 Intervenors filed an Opposition ("Int. Opp."). The misunderstandings reflected in these
19 documents demonstrate the appropriateness of the relief that Premera requests.

20 I. The Stock Plan Should Be Considered in This Proceeding.

21 The Intervenors agree with Premera that the stock plan adopted by Premera's
22 Board of Directors on October 17, 2003, and furnished to the OIC Staff that same day
23 should be evaluated by the OIC consultants and considered by the Commissioner. Motion
24 at 4; Int. Opp. at 6 ("Intervenors support the disclosure and inclusion of the stock plan in
25 the OIC Experts' review."). The OIC Staff states that, pursuant to the Commissioner's

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1 request, it has directed its experts to analyze the stock plan, and it expects to receive their
2 analysis by November 26, 2003. Staff Resp. at 1, n.1. The Staff takes the position,
3 however, that there has been no decision to consider the stock plan in this case and that it
4 is unnecessary to do so. *Id.* at 3. The Staff's position is hard to square with earlier
5 statements that the stock plan is an important part of a Form A, and that Premera's Form
6 A Statement cannot properly be considered without it. *See, e.g.,* Insurance
7 Commissioner's Memorandum Regarding Deficiencies in Premera's Form A Statement
8 (Sept. 12, 2003).¹

9 On October 30, 2003, the Commissioner directed the OIC Staff to have the
10 consultants review the stock ownership plan submitted by Premera on October 17, 2003,
11 and to submit their analysis of the plan with the OIC Staff's pre-filed testimony (unless it
12 is available earlier). The Commissioner thereby signaled his desire to have detailed
13 information about the stock plan available for his consideration at the hearing. The Staff's
14 professed uncertainty about consideration of the stock plan serves only to sow confusion.
15 It is in everyone's interest to understand that the subject matter of this proceeding includes
16 the stock plan. The Commissioner should, therefore, make clear that the stock plan will
17 be considered in his evaluation of Premera's Form A Statement.

18 II. The Staff's Assertions that the Form A Statement Remains Incomplete Cannot be
19 Accepted.

20 On September 10, 2003, Premera received a Notice of Deficiencies identifying the
21 absence of a stock plan. Premera's Board took up that matter at its next meeting on
22 October 5. On October 7, 2003, Premera advised the OIC Staff that a special Board
23 meeting would be held on October 17, 2003, for the purpose of completing consideration

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25 ¹ Premera has never agreed that a stock plan is required as part of a Form A. Any dispute
on this issue should, however, be moot in light of Premera's submission of a detailed plan.

1 of a proposed stock plan and that, if one was adopted, it would be furnished that same day
2 to the OIC Staff. The Staff expressed no reservations about this process or its timing until
3 filing their motion on October 21, 2003.

4 Notwithstanding these undisputed facts and the additional information presented in
5 the Motion, the Staff asserts that Premera "failed to remedy all remaining deficiencies in
6 its Form A." Staff Resp. at 1. In support of this assertion, the Staff cites three sections of
7 the Washington Administrative Code. All three provisions actually support Premera's
8 position.

9 The Staff first cites WAC 284-18A-360, entitled "Amendments to Form A," which
10 provides as follows:

11 The applicant shall promptly advise the commissioner of any changes in
12 the information so furnished on Form A arising after the date upon which
13 the information was provided but prior to the commissioner's disposition
14 of the application.

15 The duty imposed by this provision did not expire on October 15, 2003. On the contrary,
16 the duty expressly extends until "the commissioner's disposition of the application."

17 Premera met the obligation imposed by WAC 284-18A-360: on the very day that its
18 Board of Directors adopted a stock plan, Premera hand-delivered that plan to the OIC
19 Staff and sent it, via Federal Express, to the OIC Staff consultants. Declaration of John P.
20 Domeika ("Domeika Decl."), ¶¶ 2-4. Premera could not have acted more promptly after
21 the information was available.

22 The Staff next cites WAC 10-08-130 for the implicit proposition that a deadline in
23 a case schedule is fixed and unchangeable.² In fact, WAC 10-08-130(3) provides as
24 follows:

25 ² The Staff also cites RCW 34.05.449. That provision of the Administrative Procedure
Act governs procedure at hearings.

1 Following the prehearing conference,³ the presiding officer shall issue an
2 order reciting the action taken at the conference, the amendments allowed
3 to the pleadings, and the agreements made by the parties concerning all of
4 the matters considered. If no objection to such notice is filed within ten
5 days after the date such notice is mailed, it shall control the subsequent
6 course of the proceeding *unless modified for good cause by subsequent*
7 *order*. [Emphasis added.]

8 The Commissioner has made clear in his subsequent orders that the parties can apply for
9 relief from deadlines set forth in the Thirteenth Order if and to the extent that they can
10 establish that they need such relief.⁴ No one can predict, when a schedule is established,
11 whether a particular date may need to be shifted. The rules reflect common sense in
12 allowing for later adjustments, upon good cause shown. If, in order to consider the stock
13 plan adopted on October 17, 2003, a two-day extension of the October 15 deadline for
14 amendments is required, Premera believes that it has shown good cause for that *de*
15 *minimis* modification.

16 The Staff then turns to the only other alleged deficiency in Premera's Form A
17 Statement—namely, schedules of assets and liabilities to be transferred to a new Alaska
18 subsidiary. The Staff acknowledges that the Form A Statement contains *pro forma*
19 financial statements for this subsidiary, which list the categories of assets and liabilities to
20 be transferred, together with projected amounts for each category as of various future
21 dates (1/1/03, 12/31/03, and 12/31/04). *See* Staff Resp. at 2. As Mr. Domeika testified,
22 “[t]he schedules to the asset transfer agreement will contain the same categories of assets
23 and liabilities (as determined on a statutory accounting basis) as shown in Exhibit A-6, at
24 p. 4.” Domeika Decl., ¶ 6.

25 ³ The Thirteenth Order was entered without a prehearing conference.

⁴ The Fourteenth Order concludes: “With respect to the extension of discovery, the
Interveners have not articulated sufficient cause to extend the deadline. If a specific need
arises at a later date, the Interveners can apply for relief at that time.” The Fifteenth Order
states (at 2, n.1): “Absent a showing of a specific need and good cause, I am reluctant to
extend any deadline. If a particularized need for an extension arises, the Interveners may
renew their request without prejudice.”

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1 The Staff states that the Form A Statement “does not reflect with specificity the
2 assets and liabilities intended to be transferred.” Staff Resp. at 2-3. Premera has
3 explained repeatedly that it is impossible to provide more specificity: “we do not (and
4 cannot) know when the transaction will close, and the value of what will be transferred
5 depends upon what is shown by a balance sheet ‘snapshot’ of Premera’s Alaska operations
6 at that time.” Domeika Decl., ¶ 5; *see also* Declaration of Katharine M. Cramer
7 (September 11, 2003), ¶ 7 (“The final list of assets and assumed liabilities to be
8 transferred cannot be known until the eve of closing, which of course is after the
9 transaction described in the Form A Statement is approved and conversion is imminent.”).

10 The OIC Staff implicitly concedes that what it seeks is impossible to provide. It
11 cites WAC 284-18A-320 and suggests that Premera has failed to follow the procedures
12 prescribed therein. Once again, the provision cited supports Premera’s position. WAC
13 284-18A-320 provides in relevant part:

14 (1) *Information required need be given only insofar as it is known or*
15 *reasonably available to the person filing the statement. If any required*
16 *information is unknown and not reasonably available to the person filing, .*
17 *... the information may be omitted, subject to the following conditions:*

18 (a) The person filing shall give such information on the subject as
19 it possesses or can acquire without unreasonable effort or expense, together
20 with the sources; and

21 (b) The person filing shall include a statement either showing that
22 unreasonable effort or expense would be involved or indicating the absence
23 of any affiliation with the person within whose knowledge the information
24 rests and stating the result of a request made to such person for the
25 information. [Emphasis added.]

26 The conditions set forth above have been satisfied. Premera has provided all the
27 information that it possesses; it has pointed out where, in the Form A Statement, such
28 information can be found; and it has stated repeatedly, under oath, that it cannot provide
29 any more specific information—indeed, no one can.⁵ To claim in the face of these facts

⁵ The Staff refers to the process described in WAC 284-18A-320(2), which applies where information is available but the applicant needs more time to obtain it. In such a case, the

1 that Premera's Form A Statement is "deficient" is to invoke a Catch-22. There is no merit
2 whatever in the Staff's position.⁶ Premera's Form A Statement should, therefore, be
3 declared complete.

4 III. The Intervenors' Fears Are Unfounded, and Their Suggested Language Is
5 Unnecessarily Restrictive.

6 The Intervenors profess to be puzzled why Premera should seek a resolution of the
7 status of its application, and they suggest a hidden motive—specifically, a desire for
8 precedent that might apply to a new Form A. The Intervenors' suggestion is baseless both
9 factually and legally. The Staff's Response demonstrates why clarification is needed, for
10 it asserts that the current Form A Statement is deficient with respect to both the stock plan
11 and the schedules of assets and liabilities to be transferred to the new Alaska subsidiary.
12 The question of completeness should be laid to rest, so that the parties and the public can
13 focus upon the substance of Premera's application.

14 The Commissioner should not be inhibited in resolving the question of
15 completeness by the hobgoblins concocted by the Intervenors. As Premera noted in its
16 Motion, Premera would view a declaration of completeness as consistent with, not as
17 reducing, the agreed time for a final decision as set forth in Judge Casey's order of
18 September 12, 2003. Motion at 4, n.3. As for "precedent," Judge Casey's September 5
19 order precludes relitigation by the OIC of the question of how much time is allowed under

20 applicant can request "an extension of time for filing the information . . . to a specified
21 date." This provision does not apply here, both because the information is wholly
22 unavailable and because no one can specify the date of closing, which is when the
information will be available. That date, of necessity, will follow approval of the Form A
Statement.

23 ⁶ Equally devoid of merit is the Intervenors' suggestion (Int. Opp. at 5) that the Form A
24 cannot be considered complete until the closing of the administrative record, or that it is
25 deficient because attorney-client communications and attorney work product have been
withheld from the OIC Staff's consultants. Judge Casey's decision forecloses both
arguments. The Intervenors' claim regarding privilege is also contrary to RCW
34.05.452(1) and the Commissioner's Tenth Order.

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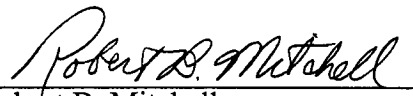
1 the Holding Company Acts for a decision on any new Form A application. *See, e.g., City*
2 *of Seattle v. Visio Corp.*, 108 Wn. App. 566, 31 P.3d 740 (2002). The Commissioner's
3 decision on this Motion can neither add to nor subtract from the force of that ruling.

4 The Intervenors do support clarification of the sentence in the Seventeenth Order
5 identified in the Motion. They assert, however, that the only thing that should be
6 considered after October 15, 2003, is the stock plan. Contrary to the Intervenors'
7 assertion, the Commissioner did not express such a view in his comments on October 22,
8 2003, and Premera believes that the limitation proposed by the Intervenors is unduly
9 restrictive. If new information comes to light later in the process, the Commissioner can
10 decide at that point whether he wishes to consider it. Be that as it may, the current
11 language in the Seventeenth Order is subject to misinterpretation, specifically regarding
12 the stock plan, and for that reason Premera asks that it be clarified as set forth in the
13 Motion.

14 DATED this 11th day of November, 2003.

15 Respectfully submitted,

16 PRESTON GATES & ELLIS LLP

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